No. 9473

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY
(a corporation),
Appellant,

vs.

MAZILLA TIGHE, AH CHONG and LEONG CHEUNG,
Appellees.

BRIEF FOR APPELLEES AH CHONG AND LEONG CHEUNG.

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A. STATEMENT AS TO JURISDICTION.

Appellant's statement as to jurisdiction appears to be correct and therefore requires no comment here.

B. STATEMENT OF THE CASE.

Appellant's statement of the case is also correct in every material detail. The second paragraph thereof on page 5 states the sole question involved herein correctly as follows:

> "The sole question involved is whether an accident which is the subject of an action in the State Court is within the coverage of an automobile policy issued by the plaintiff to the defendant Ah Chong. The policy was attached to the complaint and it insures against injuries arising out of the ownership, maintenance and use of an automobile (truck), and provided that the use included 'the loading and unloading thereof'."

As proved by the evidence and found by the trial Court, the circumstances which gave rise to the action in the State Court, briefly stated, are these: Leong Cheung was an employee of the insured, Ah Chong, and while so employed Leong Cheung made a delivery of vegetables to a restaurant known as Piccadilly Inn on Sutter Street, San Francisco, from the insured's commercial truck parked at the curb of Sutter Street, opposite and across the street from Piccadilly Inn; that, having made one delivery, Leong Cheung, while returning to the truck for a second delivery of vegetables, collided with Mazilla Tighe on the sidewalk (or is alleged to have collided with her), knocking Mrs. Tighe down and causing the personal injuries upon which the action in the State Court is predicated. (R. p. 67.)

As previously stated herein, the case turns on the question: Within the meaning of the policy of liability insurance was Leong Cheung engaged in "unloading" the truck at the time of the accident?

C. SPECIFICATION OF ERRORS.

Attention is directed especially to Appellant's first specification (Appellant's Opening Brief, p. 10), inasmuch as it sets forth a theory of the case highly unique, and, in the opinion of these Appellees, absolutely untenable for the reason that it is unsupported by any authority. This theory, expressed in Appellant's words, is:

> "That the delivery was complete and the employee at the time of the accident was returning to the truck, which at the time was parked on the opposite side of the street."

In other words, it appears to be Appellant's theory that, when a truck driver is unloading a truck, each trip to the place where the load is being deposited constitutes a complete unloading and the coverage of the automobile liability policy therefore cannot be extended to the driver's return trip to his truck for another installment of his load. This theory has two pronounced weaknesses: (1) It is illogical and technical to a high degree, and (2) it is absolutely unsupported by authority.

The remaining paragraphs of Appellant's Specification of Errors call for no more comment than will appear from time to time in the argument herein.

I.

THE JUDGMENT OF THE DISTRICT COURT IS AMPLY SUPPORTED BY THE AUTHORITIES CITED IN THE OPINION, THOUGH THERE IS NO LACK OF OTHER SPECIFIC CASES WHICH SUSTAIN THE JUDGMENT, AS WILL BE SHOWN IN ANOTHER SUBDIVISION OF THIS ARGUMENT.

On page 12 of its opening brief, in the first paragraph of its argument, Appellant criticizes the trial Court for failure to cite in its opinion adequate authority for its decision to the effect that the state action and injury in question are covered by the policy. Appellant says:

> "He neither cited nor relied upon any authority construing such a policy. The only cases cited by him were cases to the effect that, if the policy was ambiguous, it should be construed against the insurance company."

These Appellees contend that the authorities cited by the District Court in its opinion are ample to sustain the judgment, for the following reasons: The policy in question contains the provision that "Use of the automobile for the purposes stated includes the loading and unloading thereof". (R. p. 15.) Having these words in mind and recalling the circumstances of the accident, can it reasonably be said that extensive citation of authorities is necessary to support a finding that Appellant's policy herein covered the accident to Mrs. Tighe?

> "A policy or contract of insurance is to be construed so as to ascertain and carry out the intention of the parties, viewed in the light of the surrounding circumstances, the business in

> which the insured is engaged and the purpose they had in view in making the contract." (*Goss v. Security Insurance Company of California,* 113 Cal. App. 580, 298 Pac. 860.)

In the light of the foregoing citation may it not aptly be here inquired: When Appellant issued to Ah Chong its policy of commercial automobile insurance against liability incurred through use of the truck, including "the loading and unloading thereof" (R. p. 15), if it did not intend to insure against precisely such accidents as happened to Mrs. Tighe, what did it intend to insure against? The words "loading and unloading thereof" must mean exactly what they say, for they are too definite and specific to mean anything else.

And as to Ah Chong. Could he have foreseen the outcome, can it be imagined for an instant that he would have paid his good money for premiums on a policy destined to bring him a lawsuit rather than protection when his helper bumped a pedestrian on the sidewalk?

That the authorities cited by the trial Court in support of his opinion are ample for that purpose will appear from a few brief quotations therefrom:

> "As was said in Granger v. New Jersey Ins. Co., 108 Cal. App. 290, 291 Pacific 678, 700, 'A risk fairly within contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words'.
>
> Section 1644 of the Civil Code provides: 'The words of a contract are to be understood in their

ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed'.

In Moblad v. Western Indemnity Company, 53 Cal. App. 683, 200 Pac. 750, the court quotes from another case as follows:

'It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract'.

We take it that the ordinary and popular sense thus to be attributed to the words of a contract is to be related to the circumstances under which they are used, having in mind the purpose of the contract and the general situation which brought it into existence. In the case of Myerstein v. Great American Ins. Co., 82 Cal. App. 131, 255 Pac. 220, the court said:

'Where, then, the language may be understood in more senses than one, the rule of law is that an insurance policy is to be construed liberally in favor of the insured, and any uncertainty or ambiguity in the contract is to be interpreted most strongly against the insurer'."

Carl Ingalls, Inc. v. Hartford Fire Ins. Co., 137 Cal. App. 741, 31 Pac. (2d) 414.

In the second opinion cited by the trial Court when considering this point it is said of insurance policies:

> "One of the rules to be observed in the interpretation of contracts of this class is that they are to be liberally construed in favor of the insured, and all doubts or ambiguities resolved against the one who prepared the contract. * * * If the construction of language in an insurance policy is doubtful, the words, being those of the insurer, are to be taken most strongly against the company, and most favorably to the insured."
>
> *Mutual Life Ins. Co. v. Hurni Packing Co.,* 263 U. S. 167, 174, 68 L. Ed. 236, 237.

In addition to the foregoing authorities the judgment of the District Court is supported by a rule of law deducible, without material contradiction or variation, from the "loading and unloading" cases found in the reports. That is to say, from an analysis of all the "loading and unloading" cases cited in Appellant's Opening Brief and such others as have come to the attention of these Appellees, it will appear that coverage exists when, as here,

(1) The accident causing injury happens during progress of loading or unloading, and not after they (and more particularly unloading) have been finished; and

(2) When the injury is not the result of some entirely independent operation, such, for instance, as the manipulation of the ropes of a freight elevator by the insured, or his employee, as appears in *Franklin Cooperative Creamery Assn. v. Employers Liability Assur. Corp.,* 200 Minn. 230, 273 N. W. 809, cited and discussed on page 14 of Appellant's Opening Brief.

II.

APPELLANT HAS CITED NO AUTHORITY WARRANTING REVERSAL OF THE JUDGMENT HEREIN, WHICH IS IN HARMONY WITH A WELL ESTABLISHED LINE OF AMERICAN DECISIONS.

An examination of the authorities cited by Appellant in its opening brief will disclose no case which would support reversal of the judgment herein. Appellant appears to have adopted every "unloading" case in which the insurer prevailed as an authority in its behalf regardless of the fact that in cases of this character the accident causing injury either happened after unloading had been finished or was produced by the manipulation of some mechanical contrivance, such, for instance, as a freight elevator (*Franklin Cooperative Creamery Assn. v. Employers Liability Assurance Corp.,* 200 Minn. 230, 273 N. W. 809), or a falling door which had been removed from its hinges by furniture delivery men. (*John Alt Furniture Co. v. Maryland Casualty Co.,* 88 Fed. (2d) 36.)

Also, Appellant, on page 21 of its brief, endeavors to support its argument by a quotation from *Stammer v. Kitzmiller et al.,* 226 Wis. 348, 276 N. W. 629, and yet the quoted words state a rule which, applied to the facts of the instant case as distinguished from those of the *Stammer* case, supports the judgment herein in no uncertain terms. Having reference to a provision of the policy reading: "Operation, maintenance or use (including transportation of goods, loading and unloading) of an automobile", the opinion in the *Stammer* case says:

> "Losses and expenses imposed by law under the clause quoted does not carry the liability of the insurer beyond what may be described as the natural territorial limits of an automobile *and the process of unloading it.* (Italics ours.) When the goods have been taken off the automobile and have actually come to rest, when the automobile itself is no longer connected with the process of unloading, and when the material which has been unloaded from the automobile has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile may be said to be no longer in use."

A brief review of Appellant's other authorities follows:

> *Jackson Floor Covering Company v. Maryland Casualty Company,* 117 N. J. Law 401, 189 Atl. 84. (Appellant's Opening Brief, p. 13.)

Appellant cites this case against itself, for it there contended that injuries to a third party caused when a roll of linoleum fell off a small hand truck were covered by an automobile liability policy. The linoleum had previously been delivered on a customer's loading and unloading platform by an automobile truck covered by another company than the Maryland, which carried the customer's general public liability insurance. The decision went against the Maryland on the ground that unloading had been completed and a new means of mechanical transportation begun

when the accident happened. The Court said (Appellant's Opening Brief, p. 13):

> "It appears that the unloading of the plaintiff's automobile truck had been completed and that the transportation from then on was by a different means; hence, there could have been no concurrent coverage, since the carrier insuring the automobile truck was under no obligation."

All of which was not true in the instant case.

Franklin Cooperative Creamery Assn. v. Employers Liability Assurance Corp., et al., 200 Minn. 230, 273 N. W. 809. (Appellant's Opening Brief, p. 14.)

A milk wagon delivery man injured a third person by negligently manipulating the ropes of a freight elevator in a building where he was delivering milk. The court held the injury was not covered by an automobile policy. Had Leong Cheung injured some one by carelessly operating Piccadilly Inn's freight elevator the District Court for the Northern District of California would doubtless have held likewise in the instant case.

Zurich General Accident Liability Ins. Co., Ltd., v. American Mut. Liability Ins. Co. of Boston, 118 N. J. Law 317, 192 Atl. 387. (Appellant's Opening Brief, pp. 15-16.)

This was an action between two insurance carriers to determine whether the injury in question was covered by the automobile policy or that

indemnifying for public liability. The case is not even persuasive in behalf of Appellant herein inasmuch as the Court found that the unloading had been completed when the accident occurred and the automobile liability carrier was therefore not liable.

This case follows the general rule hereinbefore set forth.

John Alt Furniture Co. v. Maryland Casualty Company, 88 Fed. (2d) 36. (Appellant's Opening Brief, p. 17.)

In this case a third person was injured by the falling of a heavy door which furniture delivery men had taken off its hinges. Again the Maryland Casualty Company, Appellant in the instant case, contends that the coverage was that of the automobile insurance carrier and not of itself, the public liability carrier. The accident obviously was not the result of the process of unloading and judgment therefore went against the Maryland, the public liability carrier.

Armour & Co. v. General Accident, Fire and Life Assurance Company, Ltd., No. 20,287L, U. S. District Court for the Northern District of California.

As analyzed on page 18 of Appellant's Opening Brief, this case will readily fall into the class of actions where injury was caused not while unloading an automobile, but as the result of negligently operating some mechanical contrivance after unloading was completed. It is therefore not in point herein.

Luchte v. State Automobile Mutual Ins. Co., 50 Ohio App. 5, 197 N. E. 421, cited on page 19 of Appellant's Opening Brief, *Morgan v. N. Y. Casualty Co.,* 54 Ga. App. 620, 188 S. E. 581, on page 20, and the *Panhandle Steel Products* case on page 28, add nothing to Appellant's argument. The two former cases are obviously not in point, and the last one, when read in its entirety, is more favorable to these Appellees than to Appellant.

"Automobile Liability Insurance", by E. W. Sawyer.

This book, quoted on pages 23-25 of Appellant's Opening Brief, is apparently a manual for liability insurance men. In the language of Appellant's brief "the coverage contemplated by the committee which drafted the policy" is stated therein. Appellant further says that "Mr. Sawyer's statement, which is quoted below, is in accord with the view of the Courts as to the scope of the policy". As to authorities of this class, it may be said that such generalizations are not and cannot be judicial precedents, if for no other reason than that they *are* generalizations.

While Appellees' counsel find in Mr. Sawyer's statement no pronouncement upon which a reversal of the judgment herein could be based, if such pronouncement existed it would be but (to use Mr. Sawyer's own language) "a reasonable practical interpretation adopted by some companies", or in Appellant's words "the coverage contemplated by the committee". Such matters are not legal precedents.

III.

FOR REVERSAL OF THE JUDGMENT APPELLANT DEPENDS UPON A THEORY OF ITS OWN INVENTION UNSUPPORTED IN LAW.

On page 29 of its opening brief Appellant says:

> "If the argument should be made that the unloading was not complete until the article unloaded came to rest, and that, therefore, the unloading of the article was not complete until delivered into the Inn, still the unloading and delivery of that article was complete at all events when it was so delivered. In returning, the person making the delivery was certainly not unloading."

Appellant could not, of course, consistently argue that a vegetable peddler carrying his wares from a truck to a restaurant kitchen is not engaged in "unloading" the vehicle. Such a contention would be without reason, without sense, and without regard for the English language. But, from the law of necessity apparently, Appellant has evolved a theory previously mentioned herein, to the effect that such a peddler is not "unloading" his truck within the meaning of the policy, when, having emptied a basket or deposited an armful of vegetables, he walks back to the vehicle for another installment of his wares.

Appellant cites no authority for this novel theory, and of course there is none. It would appear to come under the condemnation expressed in *Granger v. New Jersey Ins. Co.,* 108 Cal. App. 290, 291 Pac. 678, 700, and cited supra:

> "A risk fairly within contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words."

IV.

ANALYSIS OF THE "LOADING AND UNLOADING CLAUSE" BY THE SUPREME COURT OF MONTANA.

Attention is directed to *State ex rel. Butte Brewing Co. v. Dist. Court, etc.* (Mont. Supreme), 100 Pac. (2d) 932, which is especially interesting for the reason that it follows the opinion of the District Court in the instant case as reported in 29 Fed. Supp. 69, and for the further reason that it contains a succinct analysis of the situation confronting insurer and insured under a policy containing the words "use of the automobile for the purposes stated includes the loading and unloading thereof" when an accident happens before "unloading" has been finished.

A barrel of beer from the brewery's delivery truck was placed on the sidewalk in front of "Clifford's", on East Broadway, Butte, Montana. One delivery man carried a package across the street to another customer. The second delivery man, preparatory to lowering the barrel of beer into "Clifford's" basement, went inside and down into the basement, where he unfastened a lock under two iron doors and raised one of them above the level of the sidewalk, injuring a pedestrian, Richard T. McCulloch. The opinion further states the case as follows:

> "Richard T. McCulloch brought an action in the District Court of Silver Bow County against the Butte Brewing Company for personal injuries. The brewing company requested the Standard Accident Insurance Company, hereinafter referred to as the insurance company, and the Occidental Indemnity Company, hereinafter

referred to as the indemnity company, to defend the action, which they were obligated to do if their respective policies, hereinafter referred to, covered the case; both declining to do so, an action was instituted in the District Court of the above named county by the brewing company against both the insurance and the indemnity company under the Uniform Declaratory Judgments Act (Secs. 9835.1 to 9835.16 Rev. Codes), to have determined whether the defendants therein, or either of them, were liable to defend the McCulloch action. The District Court overruled a demurrer to the complaint interposed by the insurance company [the commercial automobile liability carrier] and sustained a demurrer to the complaint interposed by the indemnity company. This proceeding is to determine the correctness of the lower court's ruling."

After analyzing the insurance policies involved, the opinion continues:

"The insurance company contends that under the facts alleged, which must be accepted as true for the purpose of the demurrer, the use of the automobile had ceased, the unloading had been accomplished and the delivery of the beer to the customer had commenced, and since the delivery, undertaken after the beer had been removed from the truck, was a part of the business of the brewing company and entailed no further use of the truck, the contract of the indemnity company, and not of the insurance company, protects the brewing company.

There are cases involving similar facts though differing in some respects which by analogy sup-

port this view. Among such cases may be cited the following: Stammer v. Kitzmiller, 226 Wis. 348, 276 N. W. 629; Franklin Cooperative Creamery Assn. v. Employers Liability Corp., 200 Minn. 230, 273 N. W. 809; Zurich General Accident etc. Co. v. American Mutual etc. Co., 118 N. J. L. 317, 192 Atl. 387; Caron v. American etc. Co., 277 Mass. 156, 178 N. E. 286, and John Alt Furniture Co. v. Maryland Casualty Co. (8 Cir.), 88 Fed. (2d) 36.

As before stated, all of the foregoing cases differ in some respects from the facts in the case before us. Another line of cases as nearly like this in facts as those above cited, sustains the opposite view. Before making reference to them we point out that the insurance company policy covers some liability when the automobile is not in actual use. Thus it specifically covers liability for injuries sustained in loading and unloading though obviously the truck is not in actual use in that process."

(The cases cited above, it will be noted, are quoted by Appellant in its behalf in the instant case with the exception of *Caron v. American, etc. Co.,* 277 Mass. 156, 178 N. E. 286.) The opinion then cites the case at bar (29 Fed. Supp. 69), *Wheeler v. London, etc.,* 292 Pa. 156, 140 Atl. 855, 856, and *Panhandle Steel Products Co. v. Fidelity etc. Co.* (Tex. Civ. Appeals), 23 S. W. (2d) 799, 801.

Continuing the opinion reads:

"We hold that under the facts here presented the unloading of the truck was a continuous op-

eration from the time the truck came to a stop and the transportation ceased until the barrel of beer was delivered to the customer. The unloading of the truck cannot be said to have been accomplished when the barrel of beer was placed upon the sidewalk. As well might it be argued that the loading of the truck consisted merely of the act of lifting commodities from the ground to the body of the truck. The loading of the truck would consist of much more than that. It would embrace the entire process of moving the commodities from their accustomed place of storage or the place from which they were being delivered until they had been placed on the truck. So, too, the unloading thereof embraced the continuous act of placing the commodities where they were intended to be actually delivered by use of the truck. This being so, the insurance company policy has application. The Court properly overruled the demurrer of the insurance company."

As to the indemnity company, the writ applied for was denied and the proceeding dismissed. As these Appellees stand in a position similar to that of the Butte Brewing Company in the Montana case and the facts are substantially the same in principle, it would appear that the judgment of the District Court herein holding Appellant liable was proper.

CONCLUSION.

In conclusion it is respectfully submitted that the trial Court did not commit error in finding that the State action and injury in question are covered by the policy, and that the judgment herein appealed from should therefore be affirmed.

Dated, San Francisco,
June 14, 1940.

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